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OVERVIEW OF THE REVISED CODE OF CANON LAW

MONSIGNOR JOHN A. ALESANDRO†

INTRODUCTION

While I sincerely appreciate your kind invitation, I am keenly aware of my lack of a civil law degree or any civil law experience except for that which my diocesan attorney himself has instilled in me. It might have been more logical to arrange a presentation from someone with both canon and civil law degrees; on the other hand, perhaps not. For, it is important to understand that the laws of the Church do form a *separate* system, an internal and primary complex of definitions, rules, and regulations, and that the civil law must be used properly to protect, implement, and foster the canonical juridical institutes, not vice versa. Do not be lulled by legal terminology into thinking that an equivalency exists between canon and civil structures. In a sense, just as we translate the canons from Latin into English while the authoritative text remains in Latin, so also canonical structures must be translated into civil structures with the awareness that the reality remains authoritatively canonical. This interplay with civil law has been a fascinating *leitmotif* through the Church's history. Sometimes, there was a complete intermingling, at others hostility, today almost an indifference except for those, like us, who are required to match them and integrate them.

The first part of the presentation offers a brief synopsis of the history of canon law, a history in which the fluctuating interrelationship with civil law is most apparent. The second part of the presentation offers an overview of the seven books of the Code with particular emphasis on some points (other than financial) in which a *canon lawyer* believes *civil attorneys* would be, or should be interested.

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I. THE REVISED CODE OF CANON LAW

BACKGROUND INFORMATION

A. *The Early Church*

Law appeared early in the life of the Christian community. Examples of it are found even in the New Testament. Despite his vociferous denunciations of the old "law," St. Paul was a model par excellence of the early Christian legislator. He articulated many moral and disciplinary norms for his converts to follow if they expected to "put on Christ." The Council of Jerusalem, under the leadership of St. James, is an example of a law-drafting situation found in the *Acts of the Apostles*. In the primitive Christian community, laws were extremely localized, addressing specific problems and answering concrete questions.

After the Edict of Constantine (313), the Church, newly emerged from the catacombs, developed openly, forming rather complex social structures. Structures require law. Furthermore, extensive conversions pointed up the need for widely applicable norms if the Church were going to protect and foster its unity. The first ecumenical council of Nicea was held in 325 to address such concerns. It treated not only doctrinal matters but points of pastoral practice and discipline as well. Ecumenical councils, such as Nicea, gave rise to a body of general laws to be respected by all Church members. At the same time, many regional councils were held. These councils went far beyond purely local questions and determinations and added to the growing set of Church laws. Finally, throughout this early period, many questions were answered and points settled in writing by individual bishops and popes. These documents, later called decretals, were saved and collected for future reference.

The manner in which these sources of primitive Church law were preserved was rather haphazard. Some norms found their way into works on civil law. For example, many ecclesiastical laws on marriage were incorporated into the work known as the *Corpus Juris Civilis*. Other texts were handed down from generation to generation in separate manuscripts. As the Roman Empire disintegrated and the eastern peoples migrated to the West, many documents were lost. During the Dark Ages, however, some documents were preserved, particularly in monasteries. These documents remained disconnected. Church law had not yet been formed into a juridical system.

In this first period, you can see that ecclesiastical law started as a completely separate entity. It was distinct from the well-developed Roman law system and in some cases, such as divorce, contrary and alien to it. Nevertheless, hundreds of years went by and some intermingling of religious and secular laws occurred. As the Roman Empire declined, the introduction of a completely different form of tribal law complicated the

matter further. There were actually three legal systems in effect at one time — Roman law (with the vestiges of the Latin language), various tribal laws (with their own developing languages), and canon law with a foot in both sectors (in Latin). In many ways, the Church and its practice (and therefore its laws) were the bridge between two disparate cultures and helped the transition to an amalgamated culture.

B. The Carolingian Reform

During the ninth century, a renewal of sorts occurred after the crowning of Charlemagne as Holy Roman Emperor. There was an attempt to centralize social life and stabilize the structures of Christendom. The second generation of Carolingian scholars turned to canon law as a means of reform and unity. One group, located probably in France, authored sets of canonical texts, drafting them some time between 847 and 852. These laws are often referred to as the Pseudo-Isidorian or False Decretals. (Many of the ingenious texts were attributed to Isidore Mercator to lend them greater weight). These documents supplemented and interpreted the existing body of law in order to defend the clergy and Church possessions against the designs of the feudal lords. Although the Church of Rome was not involved in these fabrications, one of the chief strategies of the documents was to emphasize the powers, prerogatives, and supremacy of the Pope. This form of “creative” legislation, like the Carolingian experiment itself, proved unsuccessful. The fact that the texts were clever forgeries, however, was not discovered until seven centuries later. In the meantime, they actually proved very useful in helping the Church to coordinate its canonical legislation.

By this time, Roman law as such had completely disappeared, and Latin fell into disuse. It was only because of a few intellectuals and the manuscript collections that the thread of history was maintained. For all practical purposes, law was religious. This was the common heritage. The “civil” law of the time, if we can call it that, was the will of the feudal lord. The only hope for cultural centralization was in the Church — but this experiment failed.

C. The Gregorian Reform

As the West emerged from the Dark Ages, manuscripts containing many of the Church’s laws were uncovered. Scholars began in earnest to formulate collections of such laws. These works, however, had very little system or coordination in them. Discrepancies and even outright contradictions existed side by side in the collections. The Gregorian Reform of the eleventh century, named after Pope Gregory VII (Hildebrand), needed more than collections. It sought formulas and authoritative backing for its program of renewal in the ancient discipline of the Roman

church. All the known archives of Italy were searched for texts bearing immediately on topics such as papal supremacy, the freedom of the Church and clerical celibacy. As Western civilization awoke, law became vitally important. Roman civil law, which had disappeared, was rediscovered and put to work. The Church needed more than disparate texts. It required a system of law which would put some order into its canonical heritage.

The religious-secular mixture of christendom was ultimately disadvantageous to the Church. It was like a noble dream, one faith, one people, but it was not founded on reality. The intellectual renaissance of the eleventh and twelfth centuries involved an outreach, a burst of cultural curiosity.¹ Extended trade was among its chief by-products. Trade with the East and eventually with the West required a legal system. The Church's canonical tradition was inadequate to the task. The rediscovery of Roman law served this purpose and "civil" law once again made an independent resurgence. In this climate there was only one direction the Church could go — to withdraw its activity from secular control. In other words, it needed to define itself juridically and to state its rules and regulations.

Church historian David Knowles has stated:

In the past attention was often directed almost exclusively to the contest between empire and papacy, and, within that context itself, to the controversy over the particular point of law investiture. It is only with the last fifty years that this great dispute, the contest (*lis*) *par excellence* for German historians, has been seen more correctly as one aspect of a vast movement of moral, disciplinary and administrative reform affecting the whole of society and not only the papacy and the clergy. Seen still more fully, even the wide province of ecclesiastical and religious reform is only one aspect of the emergence of western Europe from its intellectual tutelage into an adolescence of mental and practical capability; it forms in fact, a part of the new life which in other manifestations has been called the renaissance of the eleventh and twelfth centuries. The centralisation of the papacy, the monastic revival, the rebirth of canon and civil law, are all features of the same movement of the spirit which inspired the new dialectic, the growth of the schools, Romanesque art, and Domesday book. . . .

The great theoretical dispute of the primacy of power was left undecided, to be renewed again in thirty years and continued in one form or another down the ages. Superficially seen, it might seem a drawn battle. Kings continued to work their will with episcopal appointments and to ignore papal commands as before. But on a long view, for the medieval centuries at least, the Pope had won a notable victory. He had succeeded in fighting off the royal and imperial claims to paramountcy, and had established

¹ 2 D. KNOWLES & D. OBOLENSKY, *THE CHRISTIAN CENTURIES: THE MIDDLE AGES* 165 (1969).

the spiritual order in command of the Church, with its claim intact to command also the whole of society. In later struggles the Church could be resisted and attacked, but she could not be ignored.²

To a great degree, the important task of canonical systemization was accomplished by an influential Camaldolese monk named Gratian, who taught during the twelfth century at the University of Bologna. He composed a work entitled *Concordia Discordantium Canonum* (1141). As its title suggests, “concordance” and “harmony” among the canons was its purpose. Gratian related the canons to each other according to a dialectical method, and, thereby, formulated a fairly concise body of canonical legislation from the numerous texts that had accumulated over the centuries. To *Gratian’s Decree* (as it became known) were later added other collections of ecclesiastical law, both conciliar decrees and papal decretals. Finally, these supplementary collections were edited and joined to *Gratian’s Decree* in a work entitled *Corpus Iuris Canonici*, published in 1500 by John Chapuis.

D. The Tridentine Reform

The Council of Trent (1545-1563) began a half-century after the publication of the *Corpus Iuris Canonici*. It represented the Church’s formal response to the criticisms of Martin Luther, Zwingli, and other reformers. This council of the counter-reformation issued not only doctrinal clarifications and definitions but many practical disciplinary norms as well. The decrees of the Council of Trent brought a certain clarity to the Church’s position, highlighting what seemed at the time to be irreconcilable differences between the Church of Rome and the reformers. In its own way, however, it effected a revision of law unparalleled in the Church’s history. This was possible only because of the highly centralized structure of the Church during the sixteenth century — a structure that had been the implicit goal of the Gregorian reformers 500 years earlier. The years following Trent saw the development of a complex system of centralized governance, including the formation of many Roman dicasteries, both administrative and judicial, the predecessors of today’s Roman Curia.

From another point of view, the Council of Trent represents the continuing assertion by the Church of its independence from the State. The mark of this is its own legal system. One of the areas where the varying claims of civil and religious law is best seen is the Council’s declaration of canonical form as necessary for the validity of Christian marriage. While one of the purposes of this canonical law was the eradication of all “clandestine marriages,” part of its reasoning was to assert the right of the Church to control the solemnities about marriage. The vestiges of this

² *Id.* at 183.

controversy are still seen today in countries where Catholics must go through two wedding ceremonies, one religious and one civil.

E. Vatican I and the Code of 1917

Any process of centralization requires the proliferation of universal laws in order to maintain harmony and promote unity. By the time of the First Vatican Council (1869-1870), the Church's legislative activity had resulted in considerable confusion. While proclaiming the primacy and infallibility of the Pope, the Council fathers realized that the Church's legal system needed to be completely revamped. Despite the significant historical attempts to coordinate the Church's laws, there had never been an authoritative or official codification. Even the *Corpus Juris Canonici* was unofficial, scholarly work. Several decades after the close of Vatican I, Pope Pius X attempted to accomplish this task. On March 19, 1904, he announced the establishment of a Commission of Cardinals to gather into one authentic collection all of the universal canonical legislation of the Latin-rite Church. This monumental task took thirteen years. Much of the work was done by the Secretary of the Commission, Pietro Cardinal Gasparri. This first Code of Canon Law was promulgated on Pentecost Sunday, May 27, 1917. It went into effect the following Pentecost Sunday, May 19, 1918. This code abrogated, or disqualified, all other extant canonical legislation. It represented the most radical revision of the Church's law since the work of Gratian eight centuries earlier. It was modeled after the significant nineteenth century civil codes of Europe and consisted of 2414 canons divided into five books entitled *General Norms, Persons, Things, Procedures, and Penalties*. At the moment of its promulgation, the Code was the most centralized and clearest system of universal ecclesiastical legislation the Church had ever known.

Vatican I represents the final extrication of the Church from the medieval Christendom notion. The Council was interrupted by Vittorio Emanuele's entrance into Rome. The loss of the papal states was a symbol of a Church ("per forza se non per amore") emerged as entirely spiritual. Its legal framework was modeled on the civil legal framework of the continent, but the controversy of Gregory VII was settled. There are actually two complete societies (*societas perfecta*) — Church and State. It is only natural, therefore, that their legal systems should be similar, diverging only by reason of goal and means, but identical in the structures required by the nature of man (*e.g.*, general norms, procedures, and penalties).

F. Vatican II and the 1983 Code

Pope Benedict XV indicated, in promulgating the 1917 Code, that he would establish a group to update it regularly in order to dissuade the Roman Congregations from multiplying and diffusing legislation. This

structure failed to materialize and human nature took its course. Law is, after all, an evolving science and art. It reflects the changing practices and life of the community. It was inevitable that the Church's legal system would once again grow complicated, confusing and unwieldy. Within a relatively short period of time, the interpretations clarifying various canons amounted to a printed volume larger than the Code itself. This phenomenon continued throughout the present century. (A good example of the need for new law can be seen in the 1936 Roman document on annulment procedures, implementing and supplementing the 1917 Code's norms on matrimonial process.) The Church's first codification achieved a great deal of clarity and precluded the massive confusion of former times, but eventually a total revision of the Code became necessary. This need for renewal was not simply one of legal technique. On the contrary, changing theological insights and pastoral values in the Church called for a thorough canonical reform of the Church's structures. Into this situation stepped Pope John XXIII, who ushered in another stage in the revision of canon law, linked (as so often in the past) to a movement of reform, crystallized in the Second Vatican Council.

Vatican II took an even more significant step toward a separate legal system. It reorganized its law on its own model according to its understanding of itself as a Church. The revised Code still bears some resemblance to civil law, but the similarities are diminished. There are many more structures that have no counterpart in civil society. We are no longer looking at simply one species of a perfect society but at the Catholic Church, a unique community, the people of God. Thus, the Code is organized differently, based on the threefold office of Christ as king, prophet, and priest. It considers the people of God as a hierarchical communion in which all are commissioned to imitate Christ according to his or her own proper "juridic condition." The concrete effects are easily observable: "Governance" is described in General Norms and in Books II, V, VI, VII, "Teaching" is in Book III, and "Sanctifying" is in Book IV. In addition, penalties are reduced drastically.

Those of us who must travel between canon and civil law must be sensitive to this uniqueness of the Church's juridical system. It is a consistent development of a long history. If we ignore the import of that history we will be doomed to repeat its mistakes.

The process of revision illustrates this uniqueness. What seemed at the beginning to be a refinement of juridical principles turned into a re-drafting of law:

- a. November 12, 1963—suspension of activity by the Code Commission until after the Council, to base revisions on its pastoral agenda.
- b. November 20, 1965—inauguration of the Code Commission's work by Paul VI. The Council is the guiding force of the revision. Many of the canons repeat sections of the conciliar documents *verbatim* or in

summary form. Much of the post-conciliar legislation implementing the Council's decrees, such as norms on dispensations, ecumenical marriages, annulment procedures and liturgical discipline, is incorporated into the revised Code. This means that the Code must be interpreted in the light of the conciliar documents. As Paul VI explained:

Now, however, with changed conditions of things—for life seems to move along with greater speed—we must recognize with due prudence that canon law must be adapted; to the new mentality of the Second Vatican Ecumenical Council from which great contributions are being made to pastoral duties and the new needs of the People of God.³

c. The ten principles of revision approved by the first Synod of Bishops (September 30-October 4, 1967) translate the insights of the Council into juridical concepts and guide the work of legal revision in the spirit of the Council. These principles include concepts such as the following: the properly juridical nature of canon law; a completely new systematic framework; stress on pastoral care in the substance and in the form of the laws; emphasis on the rights and duties of the diocesan bishop as head of the particular Church; implementation of the principle of subsidiarity; the articulation of the rights of all Christians and recourse for their vindication.

d. One final unique aspect of the revised Code is carried over from the original Code. It is a code of principles much more similar to the civil codes of continental Europe than to the common-law system that is so much a part of our psyche. Diocesan attorneys and chancellors more than anyone else are highly susceptible to a confusion of legal cultures. We may wrongly view canon law from a common-law bias. It is only natural. There are many intersecting points since common law in its origins depended a great deal on canon law. Yet, it also developed in its own way, separated from continental Europe and the Church of Rome by the formidable English channel and the even more formidable Henry VIII.

I would suggest that you reflect on the different approaches taken by our American law and by canon law toward the three governance activities—legislation, administration (execution), and judgment. You will discover that in the Code administration is the predominant method of governance. Legislation in the Church's juridical system is not nearly so important as it is in our common-law tradition. Church legislation tends to set principles and parameters from which administrators draw guidance and juridically binding direction in fostering church order. In a

³ Address of Paul VI, *Ad E. mos Patres Cardinales et ad Consultores Pontificii Consilii Codici Juris Canonici recognoscendo*, 57 *Acta Apostolicae Sedis* 985, 988 (1965) (translated as Allocation to the Commission for the Revision of the Code of Canon Law—November 20, 1965, 26 *JURIST* 35, 39 (1966)).

sense, the administrator is called to humanize and accommodate the principles of the legislator, set them in their proper context, apply them equitably and dispense with them whenever necessary. The canonical administrator exercises particular discretion in the application of laws to make certain that the ultimate purpose of the legislation is in fact achieved.

In our common-law system we approach such accommodation in a very different manner. Our legislation is finely detailed and continually revised in order to be up-to-date and applicable to all current situations. If legislation is not effective and practical, the courts (not administrators) apply the law with equity to developing situations, to the extent that their decisions obtain the force of precedence. There is no *stare decisis* system in canon law. The courts base decisions on jurisprudence and a judgment of the facts, but their legal reasoning does not bind equal or even lower courts. Prior decisions serve simply to clarify and illuminate the legal principles at work to assist other prudent judges in understanding subsequent matters. Canonical *in jure* sections are part of a judge's studies, not the source of his law.

In common-law systems, the hands of administrators are tied by the words of their enabling legislation. Consequently, their discretion is, in a way, much more circumscribed than that of an administrator of the canon law. For Americans, a "dispensation" (relaxation of the law in a particular case) is an anomaly. It is illogical. It means that the law was not properly drafted.

I believe that the enormous mound of legislation that passes across all our desks, even at the state level, when compared with the 1752 canons of this revised Code, is eloquent testimony to this difference. As persons with one foot in each legal system we must be wary of misinterpretation and false presumptions. Americans have often been charged with being more "Roman" than the Romans! ("They make the laws, and we keep them.") In Italy, full compliance with all tax laws would result in Italians paying 125% of their income in taxes. Europeans are accustomed to the difference between the actual principles expressed in the law and the flexible application of those principles. I was told a story once about an Italian in a crowded bus who was smoking a cigar right under a sign which stated "Vietato Fumare" ("Smoking Prohibited"). When challenged, he explained that the sign did not mean that he or some other individual could not smoke. It meant: "What would happen if everybody smoked!"

I may have overdrawn the point somewhat, but I do so solely for exemplification. Canon law is a law of principles. Alone, principles are stark and unyielding. They must be applied equitably and with discretion by bishops, vicars, chancellors, pastors, and other canonical administrators. Civil attorneys must be sensitive to this very real difference in legal system and mind-set and remember that civil law is a tool at the service

of the canonical institutes of the Catholic Church. The ecclesiastical reality of the entities must be the primary criterion for judgment and decision. To give you an example, the Diocese is not first and foremost a civil corporation; it is a non-collegial ecclesiastical juridic person constituted as such by canon law itself. Which brings me to our overview of the revised Code.

II. AN OVERVIEW OF THE REVISED CODE

BOOK I — GENERAL NORMS (CANONS 1-203)

A. *Juridic Persons*

The term "moral person" is found in the revised Code only in reference to the Catholic Church and the Apostolic See.⁴ This phrase had been used consistently in the 1917 Code, including an explicit treatment in the second book, "De Personis." The revised Code has replaced the former terminology with the phrase "juridic person," a concept which is explained in Book I.⁵ The 1917 Code did not define what it meant by a "moral person." The revised Code does offer a definition of a "juridic person": "a subject in canon law of obligations and rights which accord with their nature."⁶

Some entities are *constituted* by the *law* itself—either by universal law or by particular law. A diocese is constituted (although it becomes a diocese by papal decree) by the universal law itself as a juridic person. A diocesan bishop could pass law naming certain entities (for example, Catholic high schools) as possessing juridic personality.

Other entities are *constituted* as juridic persons by the *decree* of a competent authority. For example, a bishop might create a Catholic cemetery as an ecclesiastical juridic person with its own administrator and statutes. To do so, he must issue an administrative decree of constitution.

Universitas personarum/universitas rerum: The 1917 Code distinguished solely "collegial" and "non-collegial" moral persons. This revised Code distinguishes between juridic persons composed of physical persons and those composed of goods. Then it divides the first category into "collegial" or "non-collegial" insofar as the entire group of persons makes administrative decisions for the juridic person or not. Thus, I would categorize as collegial *universitates personarum*: senate of priests, college of consultor, religious institute. The latter is a juridic person by law;⁷ the former two must be given juridic personality by the decree of the diocese.

⁴ THE CODE OF CANON LAW, Canon 113 (English trans. 1983).

⁵ Canons 113-123.

⁶ Canon 113.

⁷ Canon 607.

san bishop if he so wishes. Non-collegial *universitates personarum* are the diocese and the parish which are constituted directly by the law as juridic persons.⁸ They are *u. personarum* since they are essentially communities (*portio populi Dei, communitas christifidelium*). This is a shift in emphasis. In the 1917 Code the diocese and the parish were lumped together with foundations and benefices as "non-collegial." Now they are distinctly recognized as *non-collegial* juridic persons composed primarily of *physical persons* (with resultant rights to own property, etc.). Though non-collegial, the juridic person is constituted by the physical persons themselves. A seminary is also a juridic person by law and should primarily be considered an *universitas personarum, non-collegialis*.⁹ An autonomous pious foundation is an *universitas rerum*.¹⁰

Note that juridic persons in canon law are ecclesiastical. Their purpose is ecclesial—they are meant to serve some end of the Church which transcends the end to be achieved by any one or other particular physical person in the Church.¹¹ How closely they are identified with the Church, however, may vary.

Public juridic persons are constituted by law (religious institute, province, or house)¹² or by the decree of a competent authority (an association of the faithful)¹³ to carry out an ecclesial "munus," "nomine Ecclesiae," for the public good.

All other juridic persons are *private* and are always constituted by authoritative decree.¹⁴ Note that no association or other group in the Church can be a juridic person unless it is officially recognized by a Church authority. This includes approval of its statutes.¹⁵ This applies not only to public juridic persons acting in the name of the Church but private juridic persons as well. Even the use of the title or name "Catholic" by a private juridic person is subject to approval by Church authority.¹⁶

Statutes are the regulations (*ordinationes*) of juridic persons which define their purpose, their constitution, their manner of governance, and the procedures to be followed in their activity.¹⁷ Statutes are distin-

⁸ Canon 373 (law itself gives diocese juridic personality); Canon 515 (lawfully-established parish is juridic person by law).

⁹ Canon 238.

¹⁰ See Canon 303.

¹¹ See Canon 114.

¹² Canon 634.

¹³ Canons 312-313.

¹⁴ Canons 299, 322.

¹⁵ Canons 299, 314, 322.

¹⁶ Canon 216 (no initiative can claim title "Catholic" without ecclesiastical consent); Canon 300 (no association of faithful can call itself "Catholic" without approval).

¹⁷ Canon 21.

guished from "ordines" which are rules or norms of meetings and other celebrations.¹⁸

Note that every juridic person has an *administrator* established by law or by decree or by its own statutes.¹⁹

The diocesan bishop is clearly the administrator of the juridic person of the particular church called the diocese. The pastor is the administrator of the juridic person called the parish. The revised Code prohibits the naming of another juridic person (like a religious house) as the pastor of the parish.²⁰ In positing ecclesiastical juridic acts, it is very important to clarify whether a physical person is acting by reason of an office or *ad hoc* rights and obligations or whether a juridic person is acting through the medium of its administrator. Also, one must be clear about the rights and obligations of distinct juridic persons. This is especially important in the relationship of juridic persons. This is an area in which civil law can help and also hinder if the distinction is not sharply drawn.

In states where the bishop is a corporation sole or civilly recognized in some similar manner, there is a tendency to blur the ecclesiastical lines between the bishop's administration of the diocese as a juridic person and his rights and obligations *vis à vis* the juridic person of the individual parish, whose canonical administrator is not the bishop but the pastor. In states, such as my own, where each individual parish is a separate corporation, it would seem that such confusion would be avoided, and yet not entirely so. Our parochial corporations have the bishop, the vicar general, the pastor, and two lay trustees as their board. In canon law, the parish has only one authoritative agent—the pastor. The bishop has certain rights in regard to the activity of the parish, even financial rights. But he is not its administrator in any way, shape, or form. Certain juridic acts of the parochial juridic person may require his consent (e.g., alienation, major expenditures), but the decision to act is made by the pastor. The relative independence of the parish as a juridic person can be seen in the fact that, while the bishop appoints the pastor, he can remove him from office only because of certain reasons and in accord with a canonically detailed process.

It is important for diocesan attorneys to be aware that every diocese, every parish, every seminary, every religious institute, every religious province, every religious house (canonically constituted as such) is by law a separate and independent juridic person. They are all inter-related, often by ties of dependence, but they do not cease to exist as separate subjects of rights and obligations in their own right and administered by

¹⁸ Canon 22.

¹⁹ Canon 118. The administrator of private juridic person is always defined within its statutes. *Id.*

²⁰ Canon 520.

their properly constituted administrators.

B. Governance

1. We have already discussed the three activities of the *munus regendi*:²¹

Legislative power below the universal level cannot be delegated unless otherwise specifically indicated by the law itself.

Judicial power cannot be delegated as such except to permit others to perform preparatory acts for a decree or sentence.

Executive power can be delegated in accord with well-defined rules, especially taking into consideration whether the power is ordinary or not.

2. An important distinction in reading the law is explained in Canon 134: "Diocesan bishop" means the bishop who heads the diocese and no one else, not the auxiliary, not the vicar general. "Ordinary" means pope, diocesan bishops, those who enjoy general ordinary executive power (i.e., vicars general and episcopal), and major superiors of clerical religious institutes of pontifical law. "Ordinary of the place" means all of the above except the major superiors. Thus, when a canon refers to the "Ordinary of the place" it includes the vicar general; when it specifies "diocesan bishop" it means only the head of the diocese unless the latter has explicitly delegated someone else to deal with the matter in question.²²

3. Because the canonical system gives so much power to the administrator, especially the bishop and the pastor, it establishes other forms or juridic structures to ameliorate and protect all. Actually, the use of vicars achieves this sharing of authority. So does consultation for the validity or liceity of juridic acts.

Canon 127 is important in this regard. It states very clearly that, when the consent or counsel of individuals or a college is required for validity, the act is null and void if, in the case of the counsel, the counselors are not heard, or in the case of consent, they are heard but their majority consent is not obtained. The canon further notes the importance of the counsel given (when consent is not required): the superior should not act contrary to the vote of his advisers, especially if the advice is unanimous, without a compelling reason.²³

Note that any one who acts illegitimately is liable to reparation for the *damnum* inflicted on others as a result of his act.²⁴ If the solemnity of consultation is not followed and harm results, an administrator can be "sued" ecclesiastically. This is important to consider in many areas. For

²¹ Canon 135.

²² See Canon 134.

²³ See Canon 127.

²⁴ Canon 128.

example, Father Mallett may touch the alienation of property on the parish and diocesan levels in canon 1292 and the role of the finance council and the college of consultors for validity and liceity.

4. Canon 87 rewords more acceptably the rule of *De Episcoporum Muneribus* recognizing the diocesan bishop's right to dispense from all non-constitutive disciplinary laws for the spiritual good of his faithful. This does not apply to non-disciplinary liturgical laws, to penal laws, to constitutive laws, or to procedural laws.²⁵

BOOK II — PEOPLE OF GOD (CANONS 204-746)

A. Introduction

A significant development is the listing of the rights and obligations of all Christians at the start of Book II. Many of these canons were originally slated for the *Lex Ecclesiae Fundamentalis* which was not promulgated. The latter would have applied to the entire Catholic Church; the Code applies only to the Latin Church (not the Eastern rites who have their own code in preparation). It will be interesting to see whether this articulation of basic human and ecclesial rights in canonical form will have any juridical results. I foresee many more complaints to bishops and due process boards about the violation of personal rights. This may even extend to other forms of administrative recourse (for example, the NCCB's Committee on Arbitration of the Roman Congregations). I wonder whether the decision to remove administrative tribunals from the Code was prompted by a certain concern about turning the Church into a litigious arena (similar to the unfortunate experience in our American civil courts).

Several of the rights are worthy of note and the entire section should be carefully studied by diocesan attorneys (especially given the civil courts' increasing willingness to enter the domain of the Church's procedures when they are clearly spelled out in written form).

²⁵ Canon 87.

CANONS	RIGHTS
221	right to vindicate one's rights ecclesiastically
208	equal treatment in accord with juridic condition
212	free expression of one's opinion
218, 229	freedom of inquiry and learning of the sacred sciences
213	right to the sacraments
217	right to religious education
220	right to a good reputation
231, § 2	right to family wage, social security, and health coverage for those employed full time by the Church
281, § 3	the right of married deacons to receive remuneration sufficient to support their families

B. Diocesan Governance

The use of vicars who possess ordinary power is a form of subsidiary and shared responsibility in the exercise of the rights and obligations of administrative authority. All auxiliary bishops should be vicars general. If an auxiliary bishop is not appointed a vicar general, he must be appointed at least a vicar episcopal. As auxiliary bishops, they retain their powers to exercise executive authority even when the see is vacant.²⁶

The presbyteral council is the primary consultative group at the diocesan level regarding governance.²⁷ It should probably be used as the coordinating group to avoid confusion in consultation since there are separate duties assigned to the college of consultors²⁸ and the finance council.²⁹ There must be a balance of civil law expertise, financial "know how," and pastoral priorities. Civil attorneys are recommended as members of the finance council; members cannot be relatives of the bishop.³⁰ The college of consultors has a five year term; it is a separate group but must be drawn originally from the membership of the presbyteral council.³¹ Finally, financial accountability can be seen in the need for an *oeconomus*, a fiscal officer, who serves for a 5-year term and may not be removed except

²⁶ Canons 406, 409.

²⁷ Canon 495.

²⁸ See Canon 502.

²⁹ Canon 492.

³⁰ *Id.*

³¹ Canon 502.

for "grave" cause.³² (The canonical term may be five years but that does not require a civil contract of five years.)

C. Institutes of Consecrated Life (Canons 573-746)

In studying this section a number of concepts must be kept in mind. Consider the following three examples:

1. The distinction between religious institutes, secular institutes, and societies of apostolic life. Religious and secular institutes are considered institutes of consecrated life. Societies of apostolic life are similar to institutes of consecrated life but their members do not take religious vows.

2. The canons often refer to the particular law of the religious institute. The term "ius proprium" is used throughout this section and may refer either to the institute's constitutions or to its directory of statutes or to both.

3. Religious institutes are divided into pontifical and diocesan institutes, a distinction which is especially significant when some juridic act, such as alienation, must be referred to the competent hierarchical authority.

BOOK III — MUNUS DOCENDI (CANONS 747-833)

A. The Parochial School

The parochial school is not, in my opinion, a separate juridic person, although it could be erected as such. Rather, it is the property and an "inceptum" of the juridic person of the parish (or the religious community). Thus, the ultimate agent and administrator responsible for the parochial school is the pastor, not the principal. The pastor is responsible for the catechetical education of all of his parishioners.³³ The school may not use the name "Catholic" without authoritative consent.³⁴ The ordinary of the place has the right to appoint (but need not do so), and the right to remove or require that teachers of religion be removed from any Catholic school, even though the property of another juridic person.³⁵ (This is an example of a right of one administrator over the actions of another juridic person.)

B. Canonical Mandate

Title III of Book III addresses Catholic education. Chapter II, on Catholic universities and other institutes of higher learning, includes a

³² Canon 494.

³³ Canon 776.

³⁴ Canon 803, § 3.

³⁵ Canon 805.

~ canon stating that all those who teach the theological disciplines in any institutes of higher learning whatsoever should have the mandate to do so from the competent ecclesiastical authority.³⁶ This canon and the others in this section have raised considerable controversy in the Catholic academic community, particularly in the United States. There is theological objection to the mandate canon. There is also some legal concern which, it is hoped, will be unfounded. The Canonical Affairs Committee and other organs of the NCCB will certainly be addressing Canon 812 on the canonical mandate for those teaching the theological disciplines, but some have suggested that, no matter what procedures are followed, the very existence of the canon will stir up trouble in the civil courts in regard to certain forms of governmental aid available for students in Catholic colleges and universities. Questions about tenure are raised by the canons in this chapter.³⁷ Thus, some civil attorneys worry that the implementation of the canon might prompt litigation and create divisiveness at universities which are required to take action against faculty members based on Canon 812. Also, some suggest that the power of an ecclesiastical authority to police theology faculties could make it more difficult in the future for those institutions to defend their right to receive public funds since it could be harder to claim that theology courses are strictly academic disciplines with their own academic integrity.³⁸ Since Catholic colleges benefited directly or indirectly from ½ billion dollars of governmental aid in 1980, serving 585,000 students in 239 institutions (50% of all Catholic higher institutions in the world), it is an important question. For me, canonically, there is not much change from 1917. We have moved from a right to intervene (negative vigilance) to an obligation to certify or commission (positive deputation) and to intervene, but civilly there might be practical implications.

BOOK IV — THE SANCTIFYING CHURCH (CANONS 834-1253)

A. *Adoption and Baptism*

This is an area in which norms of the Episcopal conference would be helpful. The canon mentions the possibility of retaining the names of the biological parents in baptismal records of adopted children. The canon states that there should be respect for the local civil law.³⁹ Thus, attorneys should advise their bishops about local state legislation on the mat-

³⁶ Canon 812.

³⁷ See, e.g., Canon 810.

³⁸ Cf. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 761-67 (1976) (religious activity did not permeate Catholic institution therefore government aid was permissible); *Tilton v. Richardson*, 403 U.S. 672, 680-82 (1971) (religiosity did not permeate studies).

³⁹ Canon 877.

ter. Another part of the canon permits the pastor to enter the father's name in the case of a child from an unmarried couple if the father admits paternity to the priest and two witnesses.⁴⁰ This may very well cause problems in a state in which baptismal records are legally acceptable as proof and in any place it will cause problems and embroil the Church in subsequent paternity suits. I suggest careful reading of this canon and legal advice regarding diocesan policy.

B. Marriage

1. Canon 1055 — establishes a new description of marriage — a marriage covenant by which a man and a woman constitute between themselves a partnership of their whole of life, ordered by its nature to the good of the spouses and to the generation of children, raised by Christ to the dignity of a sacrament for the baptized.⁴¹

2. Consanguinity — fourth degree by Roman law, first cousins or grand nephew/grand aunt. Dispensations from fourth or third degree but not from direct line or brother-sister.⁴²

No collateral affinity.⁴³

These changes may cause problems in some states, depending on civil law, and should be researched.

3. Adoption — no marriage in the direct line or for adopted brother and sister.⁴⁴ This is an ecclesiastical impediment and no longer depends on the prevalent civil law.

4. Fraud — American civil jurisprudence in this area may be helpful to ecclesiastical tribunals since this is a new ground by which consent may be canonically invalid. Note that the fraud must involve deception about a quality of the person, committed in order to obtain marital consent, which of its own nature can gravely upset the partnership of conjugal life.⁴⁵

5. Formal act — Those who apostatize from the Catholic faith by a "formal act" are no longer bound by the law requiring marriage before a priest or deacon and two witnesses.⁴⁶

6. Canon 1112 raises the possibility (with the approval of the episcopal conference and the Holy See) of an individual diocesan bishop permitting lay persons to officiate at marriages within a diocese if priests and

⁴⁰ *Id.*

⁴¹ Canon 1055.

⁴² Canon 1091.

⁴³ Canon 1092.

⁴⁴ Canon 1094.

⁴⁵ Canon 1098.

⁴⁶ Canon 1117.

deacons are unavailable in sufficient numbers.⁴⁷ This may raise some civil law questions. It is a real possibility in some clergy-poor dioceses and may become even more of a reality if the number of clergy continues to decline.

7. Secret Marriages are still permitted in certain circumstances, a fact which diocesan attorneys do not like to hear. The cause must be "grave and urgent."⁴⁸ This has sometimes been employed in regard to social security cases (the need for an American "dispensation") although the changes in the law have alleviated the problem (a good example of the common-law system).

C. *Christian Burial*

"Manifest sinners whose burial will cause public scandal" is a more objective and flexible phrase.⁴⁹

D. *Holydays*

Must be addressed by the episcopal conference in their November meeting or all ten will be in effect.⁵⁰ Friday abstinence will not be altered by the Code since our particular law in the United States is not abrogated by the Code.⁵¹

BOOK V — TEMPORALITIES (CANONS 1254-1310)

This is an important book for diocesan attorneys since it treats so many matters which have an effect in civil law. Father Mallett will be addressing these norms in his paper.

BOOK VI — ECCLESIASTICAL SANCTIONS (CANONS 1311-1399)

The revised Code has retained mainly *ferendae sententiae* penalties (that is, penalties which must be imposed by an ecclesiastical authority rather than automatically incurred). In this regard, it uses penalties not so much to punish as to reconcile sinners. There are only seven automatic excommunications in the Code. One of them is the excommunication attached to the procurement of an abortion.⁵² There has been a suggestion to change this penalty to a personal interdict (very similar to an excommunication) but this shift was considered ill-advised since it might be

⁴⁷ Canon 1112.

⁴⁸ See Canons 1130, 1132.

⁴⁹ Canon 1184, § 1, 3°.

⁵⁰ Canon 1246.

⁵¹ Canons 1251-1253; cf. Canon 6.

⁵² Canon 1398.

misinterpreted. Thus, excommunication was left in place as a sign of the Church's judgment about the seriousness of abortion and the clear obligations which Catholics have in this regard.

BOOK VII — PROCEDURES (CANONS 1400-1752)

A. *Matrimonial Tribunals*

Civil divorce: The Code demonstrates a more lenient attitude toward civil divorce. It implicitly appears as the settlement of purely civil effects by civil means and in fact the proper forum for such actions.⁵³

Forum of competence: respondent; contract; petitioner with consent of officialis of respondent's tribunal; forum of proof with consent of same officialis.⁵⁴

Any person (including unbaptized) may impugn a marriage in an ecclesiastical tribunal.⁵⁵

There can be one lay associate judge (male or female) with two clerics on a collegial tribunal.⁵⁶ Note that deacons are clerics.⁵⁷

There exists mandatory review of all affirmative sentences of nullity in the first instance. This is being addressed in different ways throughout the country, mainly by harnessing the cooperation of more personnel to expedite the reviews. The review results either in a decree finalizing the juridical process and permitting execution of the sentence or in admission to a full trial in the second instance by the same or another panel of appellate judges.⁵⁸

B. *Confidentiality*

This is a highly volatile and important issue not only for tribunals but for all Church records. It is clearly one in which diocesan attorneys' assistance is vitally needed. It involves the entanglement of the civil law with Church norms. Canon 489 mandates a secret archive for sensitive Church records whose key is to be held by the bishop.⁵⁹ I have already mentioned the fact of secret marriages.⁶⁰ Finally, tribunal cases contain many materials which are extremely sensitive. Much lobbying in Rome permitted us to obtain a wording of canon 1598 which gives the judge discretion to withhold the contents of some acts from the parties, provided

⁵³ Canon 1672.

⁵⁴ Canon 1673.

⁵⁵ Canon 1674.

⁵⁶ Canon 1421.

⁵⁷ Canon 266.

⁵⁸ Canon 1682.

⁵⁹ Canons 489, 490.

⁶⁰ See Canons 1130-1133; *supra* note 48 and accompanying text.

that the right of defense is scrupulously protected. This is crucial since the testimony of psychiatrists and psychologists, both oral and written, is often given in confidence. Many times, witnesses will cooperate with a judge solely if their testimony is kept confidential. The tribunal procedure is much misunderstood by the populace at large. We should protect our records at every juncture by invoking the First Amendment whenever possible. The earlier reading of this canon would have endangered our efforts since both parties and their ecclesiastical advocates would have had the absolute right to inspect all pieces of testimony. Now the judge can restrict certain pieces of testimony to avoid grave harm provided that the secrecy does not interfere with the ability of the person to argue his case. Nonetheless, when persons cannot get satisfaction from the ecclesiastical courts, they will turn, as some have, to the civil courts. When this occurs we must be able to protect our religious integrity and confidentiality consistently until our wonderful American *stare decisis* system makes it clear to all concerned that the civil courts will simply not entertain such frivolous fishing expeditions into murky ecclesiastical waters.

C. *Due Process*

1. Pope John Paul II deleted the canons on administrative tribunals. The plenary session of the Commission in 1981 had made them optional. It may be that he decided to remove them because they were only optional from the outset. On the other hand, it may be a fundamental rejection of the notion that ecclesiastical administrators can be judged by independent members of the Church. The notion may be tested in the future and I would suggest that it is a structure which will reappear in some form. It would have permitted judicial decisions right here on the American scene without recourse to the Sacred Congregations in Rome, but it also might have led to a litigation explosion.

The Church, therefore, limits the indication of rights to hierarchical recourse. For all those subject to the bishop, recourse against their administrative acts is to the bishop. One has recourse against the bishop's administrative acts to the appropriate Roman Congregation (although the NCCB Committee on Arbitration may be able to settle the matter in certain cases).

2. On the other hand, the Code does stress the need for the voluntary settlement of disputes and the respect for people's rights. Thus, an episcopal conference can mandate offices of mediation and due process in all its dioceses⁶¹ although this is unlikely in the United States where a voluntary system already exists. The Code, however, recognizes our system for the entire world and states that any diocesan bishop can set up such an

⁶¹ Canon 1733.

office in his own diocese.

The normal means of conciliation by mediated mutual agreement, compromise and arbitration, are recognized in the Code and may be more important in the future, given the stress on personal and ecclesial rights seen in Book II and elsewhere.

CONCLUSION

In general, the Code is more distinctly "religious" and, concomitantly, there is more reliance on civil law in regard to secular matters. I am certain that the close cooperation of canon lawyers and diocesan attorneys, which has been so successful under the 1917 Code, will continue and grow under the revised Code. It is important to have this collaborative effort and to study comparative law in order to protect the uniqueness of the Church and its juridic system, to avoid confusion with civil law concepts, and yet to permit the Church to function in harmony with the laws of our municipal, state, and federal governments.